

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1774-CR

Cir. Ct. No. 2012CF514

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. RABIDEAU,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
THOMAS J. GRITTON, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Joseph Rabideau appeals from an order denying his motion for sentence modification. The circuit court rejected the parties' joint recommendation for a concurrent sentence and imposed a consecutive six-month

jail term. We reject Rabideau's claim that a sentence-credit adjustment is a new factor warranting resentencing, and affirm.

¶2 Rabideau was on bail in two cases involving his longtime girlfriend and their daughters. The crimes ran the gamut from bail jumping to disorderly conduct to misdemeanor battery to strangulation and suffocation. Conditions of bail were that he have no contact with his family or their shared residence. In spite of that, Rabideau left them dozens of voicemail messages and one of his daughters came home to find him in the house. He fled through a window, damaging it. His bail was revoked and he was sentenced to eighteen months in prison on one of the cases with eighteen months, extended supervision and a consecutive six months in jail on the other.

¶3 On the instant offense, Rabideau was charged with two counts of felony bail jumping and one count of criminal damage to property with a domestic abuse assessment. He pled no contest to one of the bail-jumping counts; the other counts were dismissed but read in for sentencing.

¶4 The parties jointly recommended six months in jail concurrent to his prison sentence. The circuit court asked, "[W]hy are we doing this?" and "Why even charge these?" The State explained that, as the other cases involved some of the same individuals, it did not deem this matter "particularly damaging." The circuit court disagreed. It ordered a six-month jail sentence to be served consecutively, with 150 days' sentence credit, which should "cover it." The court removed the credit after the Department of Corrections questioned it based on the sentence's consecutive nature, as it had been applied in another case.

¶5 Rabideau moved for sentence modification. He asked that his consecutive sentence be made concurrent on grounds that the removal of the

150 days' sentence credit was a "new factor," because he ended up with a sentence different than the parties and the court expected.

¶6 The circuit court was not persuaded. It explained that it in no way thought Rabideau should get a "freebie," and that it applied the sentence credit it thought, albeit mistakenly, was due. The court concluded that the presence or absence of sentence credit would not have changed its mind at all as to the sentence imposed. The court explained that it first determines a fitting sentence, then applies any appropriate sentence credit. Rabideau appeals the denial of his motion.¹

¶7 A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A defendant must establish the existence of a new factor by clear and convincing evidence. *State v. Franklin*, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989).

¹ The appellate issue concerns the sentence modification hearing. We must observe, however, that the original sentencing fell too far shy of the directive re-enunciated in *State v. Gallion*, 2004 WI 42, ¶4, 270 Wis. 2d 535, 678 N.W.2d 197, that a circuit court's exercise of sentencing discretion be set forth on the record. The court is to identify the objectives of its sentence, such as protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.*, ¶40. While we do not condone the lack of explanation, we recognize that the parties came to the court with a stipulated agreement, and the court's questioning of the recommendation for a concurrent sentence permits us to tease out some of the court's sentencing rationale. As neither party requested a fuller *Gallion* analysis then or at the sentence modification hearing, we conclude that the error was rectified when the court fleshed out its comments at that second hearing.

¶8 Our review of a circuit court’s decision on a motion for sentence modification entails a two-part standard of review. *See id.* at 8. We review de novo the legal question of whether the defendant has demonstrated that a new factor justifies a motion to modify a sentence. *Id.* If he or she has, we review for an erroneous exercise of discretion the circuit court’s decision as to whether or not to modify the sentence. *Id.* To prevail, the defendant must demonstrate both that a new factor exists and that it justifies modification of the sentence. *State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828.

¶9 Rabideau complains that the circuit court did not “explicitly” determine whether his credit adjustment constituted a new factor. It did not have to. A court may address either step first and, if not proved, need not address the other. *See id.* It thus was entirely proper to discuss sentence modification without having decided whether it deemed the sentence credit adjustment a new factor.

¶10 Furthermore, it is irrelevant here whether the adjustment constitutes a new factor. If it did not, the court did not need to go further. If it did, its existence would not automatically entitle Rabideau to relief because whether to modify his sentence still rested within the circuit court’s discretion. *See State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983).

¶11 Although the court did not explicitly brand the credit adjustment a new factor, its comments both show that it at least implicitly considered whether knowing that no sentence credit was available would have caused it to impose a different sentence and demonstrate a proper exercise of discretion:

As I read the transcript, the Court wasn’t in favor of concurrent at all. In fact, I questioned why would I even do this

....

I thought he was getting a freebie [from the plea recommendation], and I wasn't going to do that and that is the reason I did it consecutive, and the fact that I gave him 150 days credit, I was told he had credit and then I find out later on that he was given credit in another case. That wouldn't have changed my mind at all about what the sentence would have been.... [T]here is just no way I was [g]oing to do a concurrent sentence here I questioned this case, it is a felony, and I even questioned why there is a recommendation of concurrent.

I'm not changing the judgment of conviction. I think he got exactly what was my intention to give him based upon my reading of the transcript and based upon my memory of the case that ... I was not going to give him a free one.

¶12 The court also made clear that it “[does not] do sentences based upon credit ... because I don't think that is the right way to do it.” The court is correct. *See* WIS. STAT. § 973.155(2) (2011-12)² (“After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted”). Indeed, to first determine sentence credit and then to impose the sentence constitutes an erroneous exercise of discretion. *See Struzik v. State*, 90 Wis. 2d 357, 367-68, 279 N.W.2d 922 (1979).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

